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SUPREME COURT, U. S.

Supreme Court of the United States

October Term

No. 317

LEO P. McKEE, as Trustee for INDUSTRIAL FINANCE CORP., et al.,

Petitioner,

versus

GREAT AMERICAN INSURANCE COMPANY,

Respondent.

LEO P. McKEE, as Trustee for INDUSTRIAL FINANCE CORP., et al.,

Petitioner,

versus

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Respondent.

Brief of American Casualty Company of Reading, Pennsylvania, in Opposition To Petition for Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

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PRELMINARY STATEMENT

This respondent is concerned only with case number 19,954 as it appeared in the United States Court of Appeals, Fifth Circuit. This respondent challenges petitioner's statement of jurisdictional grounds (Paragraph 2) on the ground that Title 28 U.S.C. §2101 does not confer any jurisdiction but merely prescribes a time limit within which to petition this court for a writ of certiorari otherwise allowable by law.

Respondent exercises its option to restate the questions presented as permitted by Supreme Court Rule 40, Section (D)5.

QUESTIONS PRESENTED FOR REVIEW

1. Did Petitioner make timely discovery and or notice to the respondent to enable recovery under the bond?
2. Even if petitioner had made timely discovery of losses and had given timely notice to respondent, could recovery be had by petitioner as trustee for the bankrupt obligee under the bond for alleged losses occasioned by the sole stockholder and dominant factor in the operations of the Bankrupt corporation?

STATEMENT OF THE CASE

Respondent (hereinafter called "surety") executed a Bankers' Blanket Bond in an amount not to exceed $100,000.00 obligating itself as surety to indemnify a cor-

poration known as Commercial Capital Corporation (hereinafter called "obligee") against any losses (as described in the bond) sustained while the bond was in force and discovered by the obligee within twelve months after the bond was cancelled resulting from fraudulent acts of certain corporate employees (R. 15, 25 and 27). Section 3 of the "Conditions and Limitations" of the bond (R. 16) provides that the obligee must give the surety notice of any loss claimed under the bond "as soon as possible after" discovery of the loss and within ninety days after learning of the loss the obligee "shall file with the underwriter an itemized proof of claim duly sworn to."

Thus, two conditions precedent to liability must occur, to wit: first, the losses must be discovered by the obligee within twelve months after the bond was cancelled, and, second, written notice and claim must be given the surety within ninety days after timely discovery.

Petitioner, as plaintiff in the United States District Court, Southern District of Florida, sued respondent for $46,585.14 in damages claimed to be the result of certain defalcations of one ROBERT A. MC KEE, who the complaint itself states was, since the formation of the corporation, its "sole stockholder and the dominant factor in its operation during the effective period of the bond." (R. 6).

The record further shows that the bond in question was cancelled effective January 27, 1960 (S.R. 7); that the claimed losses were not discovered by the trustee until July 25, 1961 (R. 13), and that written proof of loss was furnished by the trustee to the surety on December 21, 1961.

The District Court entered summary final judgment for respondent (surety) concluding that the alleged defalcator was the alter-ego of the bond obligee (since the complaint alleged he was sole stockholder and dominant factor in its operations) and that as such, the losses were discovered by the obligee corporation at the instant they occurred at the hand of its obligee and hence **notice** to the surety given by the trustee almost two years later is untimely. (S.R. 9-12) Any other approach to the question of when the losses were discovered would have rendered the **discovery** untimely because the petitioner, as trustee for the bankrupt obligee corporation, admitted he did not discover the alleged losses, until July 25, 1961 (approximately a year and a half after cancellation of the bond).

The Court of Appeals' decision sought to be reviewed in this proceeding affirmed the District Court in finding untimely discovery and notice and in finding that the trustee can stand in no better position to sue the surety than the bankrupt could and that the bankrupt, being the alter-ego of the alleged defalcator, had no standing to sue the surety.

We challenge the first paragraph on Page 5 of the petition for writ of certiorari which concludes with a reference to Page 7 of the record in this case. Page 7 of the record was all stricken by the District Court (except the last paragraph on Page 7) by an order found on Page 1 of the supplemental record below. Petitioner's further reference to the stricken matter found on Page 7 of the petition is noted. No appeal was taken or error assigned regarding the striking of those portions of the complaint and reference to them herein is improper.

ARGUMENT

Very little can be said to amplify the findings and conclusions of the District Court and the Court of Appeals, except to point out that the problems facing the trustee in this case appeared in one form or another in three other 5th Circuit cases between 1934 and 1957 and, though the results of the cases varied because of variations in facts, the principles of law alluded to in each case are consistent. These cases are **Murray vs. American Surety Co. of New York**, 69 F.2d 147; **Franklin Savings & Loan Co. of Macon vs. American Employers Insurance Co.**, 99 F.2d 494; and **J. S. Fraering, Inc. vs. Employers Mutual Liability Insurance Co. of Wisconsin**, 242 F.2d 609.

The cases referred to in the petition concerning the Court's alter-ego finding have no application in the instant case, because in this case the complaint itself alleges the facts, which, as a matter of law as well as common sense, preclude a conclusion that ROBERT A. MC KEE was anything other than the alter-ego of COMMERCIAL CREDIT CORPORATION.

Curiously, petitioner relies upon the **Franklin Savings** case above-noted in support of its second question challenging the court's finding that the trustee has no more rights than the bankrupt itself (see Pages 4 and 9 of the petition). The distinction between the instant case and the **Franklin** case in the area concerned in petitioner's second question lies in the fact that the corporate officer in **Franklin** whose knowledge the surety was attempting to impute to the corporation, was not shown to have owned **any** stock in the corporation and was certainly not a "dominant factor" in its operations (she was

a young female bookkeeper who assisted the bonded defalcator and her only other position was that of a non-bonded director of the insured corporation). As previously noted, the defalcator in the instant case was the "sole stockholder" and "dominant factor" in the corporation's operations. This is the distinction justifying the finding of alter-ego status.

CONCLUSION

For the foregoing reasons it becomes apparent that the decision of the Court of Appeals, Fifth Circuit, found at 316 F.2d 428, herein sought to be reviewed, should be affirmed and the petition for certiorari dismissed.

It is further apparent that none of the reasons for which this Honorable Court are normally inclined to grant certiorari exists. Petitioner has failed to demonstrate that the decision complained of in any material way conflicts with any decision of another court of appeals on the same matter. Petitioner has asserted a conflict on only one of the three grounds ruled upon by the lower courts, which does not exist in fact, and which still leaves two other grounds in any event. There is no state or territorial question involved. There is no question of federal law involved, much less one of considerable import which has not been but should be decided by this Honorable Court. There has been no charge that the lower courts have so departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

No other grounds for this court to accept jurisdic-

tion have been urged other than a unsupported recitation regarding the importance of the case to Floridian investors who, according to petitioner, have almost a million dollars at stake in the two bankrupts. We fail to see the importance of that statement in view of the fact that the claim against this respondent was only $46,585.14 and it but further demonstrates that petitioner seeks merely a further appeal about a matter that is of importance only to the people involved. This court has refused to grant certiorari in such instances. CF **Rice vs. Sioux City Memorial Parks Cemetery**, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true printed copy of the above and foregoing Brief of American Casualty Company of Reading, Pennsylvania, in opposition to petition for writ of certiorari was mailed to Carl V. Wisner, Jr., Attorney for Petitioner, 201 Southeast Second Street, Fort Lauderdale, Florida, and to Norman C. Roettger, Jr., of the law firm of Fleming, O'Bryan & Fleming, Attorneys for Respondent, GREAT AMERICAN INSURANCE COMPANY, Professional Building, Fort Lauderdale, Florida, by deposit in the United States mails, postage prepaid, this 21st day of August, 1963.

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